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BRIEF BY INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA, AMERICAN PETROLEUM INSTITUTE, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA AND MID-CONTINENT OIL & GAS ASSOCIATION, AMICI CURIAE, IN SUPPORT OF PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI HEREIN.

SUPREME COURT OF THE UNITED STATES

October Term, 1946.

No. 733

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, a Corporation, PETITIONER,

v.

FEDERAL POWER COMMISSION, LOUISIANA PUBLIC SERVICE COMMISSION, CITY OF NEW ORLEANS, LOUISANA, and CITY OF BATON ROUGE, LOUISIANA, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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January, 1947.

EASTWOOD PRINTING CO., 2031 CURTIS STREET, DENVER

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PRELIMINARY STATEMENT.

The judgment of this Court denying petition for writ of certiorari was entered herein on January 6, 1947.

This brief is presented by Independent Natural Gas Association of America, American Petroleum Institute, Independent Petroleum Association of America and Mid-Continent Oil & Gas Association, *Amici Curiae*, pursuant to consent as authorized by paragraph 9 of Rule 27 of this Court.

The only party respondent to this record possessed of any interest whatever in this proceeding is the respondent Federal Power Commission, represented by the Solicitor General of the United States. None of the questions and issues in which the respondents, Louisiana Public Service Commission, City of New Orleans, Louisiana, and City of Baton Rouge, Louisiana, originally were interested, are involved in any degree or at all in the review presently sought herein *(Comm. Br., pp. 4, 21)*. Such respondents now are merely nominal parties to this record, and named as such simply because each thereof was a party to the case before the Commission with respect to issues long since disposed of.

The issues here relate solely to the delegation of and limitations upon the rate-regulatory jurisdiction of the Commission under Section 1 of the Natural Gas Act, as enacted by the Congress.

The legality of the jurisdiction assumed by the commission herein has not been adjudicated by this Court in any case.

The inevitable consequence of the application of the Commission-determined conception of its authority over local producers, gatherers and vendors of natural gas is a matter of serious and nation-wide importance and concern, not alone to such local producers, gatherers and vendors, but to the producing States as such and to all future consumers of natural gas, particularly in States other than the States of origin of such gas.

If those, as Interstate Natural, who produce natural gas and make outright sale thereof locally in the field of origin to others, who thereafter and independently subject themselves to Commission regulatory authority by engaging in "the transportation * * * in interstate commerce" and "the sale in interstate commerce for resale" of such natural gas, are to be subjected to Commission regulatory authority, the result, now rapidly developing, is confusion, conflict and the breakdown of the administration of the Gas Act.

There are thousands upon thousands of such producer-field vendors throughout the country. The character of their titles and operations are widely variant. Many are owners; many are lessees, many are royalty owners and many are contractors of various types. Many are large enterprises, many are small enterprises and many are individual or partnership enterprises. Many are producers of gas only and many are producers of gas and oil in combination. Many sell the natural gas as produced at field pressures and many process the gas in one way or another, by compression, extraction, dehydration or purification, before such local field sale. Many have no contractual or other dealings or relations of any kind with a "natural gas company," many have more contractual dealings or relations with a "natural gas company" and many a one is, or is affiliated with, a "natural gas company."

Each such local producer-vendor, if subject to Commission regulatory control, must be accorded the same measure and character of regulation as all others. There can be no discrimination. Nor is the Commission jurisdiction elastic,—to be enlarged, to be restricted, or to be withdrawn at the will and convenience of the Commission. The Congress did not so enact, or so intend.

Thus the Commission, under its theory and assumption of jurisdiction, must embark upon the endless and actually impossible task of regulating "the costs" and field price of every such field vendor.

The exercise of such authority collides directly with the field prices of natural gas as heretofore and now fixed by local authority, such, for example, as the States of Texas and Oklahoma. In such local fixation of field prices, conservation, avoidance of waste, protection of relative property rights, pro-ration and numerous other factors are material. Over most of such factors the Federal Power Commission has no lawful authority whatever under the Gas Act or otherwise.

Naturally, the producing States, to the end of sensibly conserving their irreplaceable reservoirs of natural gas, are insisting on the utilization of vast quantities of "residue gas" and other "flare" production. Such gas generally

cannot be stored either below or above ground but must be used forthwith to avoid waste. Presently, the Federal Power Commission envisions itself as the price-protector of "the ultimate consumer," who ordinarily is resident of a State other than the State of production of the natural gas consumed by him. Tomorrow's benefits of conservation are remote as compared with today's "gas bill." In the very nature of things, the specific function of rate regulation today and the broad function of conservation today and tomorrow cannot be discharged by the same administrative agency if either function is to be performed properly, non-politically and really in the public interest.

Similarly, it is equally apparent that conservation, with the many factors necessarily involved therein, such as production, storage, waste, "end-use," pro-ration and price, as now developed and developing in Texas, Oklahoma, California, Louisiana, Kansas and elsewhere, cannot be brushed aside as not to be affected, seriously hampered and actually frustrated by the federal rate-regulatory control now asserted in this case by the Commission. The conflict between conservation by the States and such federal regulation is a very real one. There is no slightest foundation in the Gas Act for the present Commission assertion of power over local activities, including field production and sale.

Moreover, competitive field prices no longer can exist or establish market conditions, for the local vending price of every producer becomes a matter for individual determination in some sort of a rate case.

Congress, as is disclosed affirmatively, by the Act, by the development of the structure thereof, by the history of the legislation and by the common sense of the situation, intended no such confusion, no such conflict, no such intrusion of federal administrative authority into local affairs, and no such regulation of the oil and gas industries. Yet such is the impending and inevitable result of the current administrative and judicial assumptions as to the virtually limitless regulatory jurisdiction of the Commission over the natural gas industry and those engaged in any and every phase of that business.

Amici Curiae represent virtually the entire oil and natural gas industry of the country, and again ask the authoritative determination of the legality of the Commission-asserted jurisdiction, which is directly challenged in this case.

Since "a denial of certiorari by this Court imports no expression of opinion upon the merits of a case" (*House v. Mayo*, 324 U.S. 42, 48, 65 S.Ct. 514-521), the immediate and future grave nation-wide public and private interest cannot be served by such "a denial." Whatever the decision of this Court upon the merits might be, the direct adjudication of the issues here presented is a judicial function, which may not be discharged, by according *de facto* validity to the power asserted by the Commission but at the same time withholding the *de jure* determination of the propriety or impropriety of such Commission action.

The result is that the refusal of this Court to entertain, resolve and settle the jurisdictional question involved, enables the Commission *in fact* to define its own authority, unencumbered by any final or authoritative judicial approval or restraint whatever.

We summarize the relevant factual and legal controls here present:

I.

The Facts.

Interstate Company produces, gathers and purchases *locally* in Monroe Field, Louisiana, substantial quantities of natural gas, which gas is sold and delivered *locally* in the Monroe Field to three purchasing pipeline companies. Each of such pipeline companies prior thereto had extended its pipeline and compressor-station facilities *into* the Monroe Field for the purchase by and delivery to it of such gas in the Monroe Field and also for the purchase by and delivery to it of other natural gas in the Monroe Field from others than Interstate Company.

Such sales and deliveries by Interstate Company locally in the Monroe Field are completed consummated trans-

actions, after which Interstate Company has no right, title, interest, control or responsibility whatever with respect to such gas, its subsequent shipment, transportation or sale or any of the incidents thereof.

After such sales and deliveries of said gas by Interstate Company locally in the Monroe Field, each of the several purchasers thereof compresses, locally in its own compressor station in the Monroe Field, the gas so purchased from and delivered by Interstate Company (together with other gas purchased from and delivered by others) and thereupon transports the gas, so prepared by compression for shipment, into states other than Louisiana, where thereafter it is sold for resale for ultimate public consumption. Each of such purchasing pipeline companies, operating in different states, thus transports the gas in question "*in* interstate commerce" and sells it "*in* interstate commerce."

It is uncontradicted that *all* of the facilities, activities and business of Interstate Company herein involved, are local to and fully consummated and terminated in the Monroe Field, Louisana.

II.

The Commission Order.

The Commission, without any reference whatever to the terms of the Natural Gas Act, nevertheless concluded, under the theory of "constant flow": that "the transportation" by Interstate Company of natural gas "from the mouths of the wells from which it is produced" and the delivery thereof "at a point near Perryville" and "at a point near Guthrie," both in the Monroe Field, Louisiana, constituted "the transportation • • • *in* interstate commerce" of such gas; and that the complete and outright local Monroe Field sales of such gas "at a point near Perryville" and "at a point near Guthrie" constituted "sale *in* interstate commerce" of such gas *(R. V. 1, pp. 82-83)*.

In support of its conclusions, the Commission made no supporting finding of any kind, except the finding of "constant flow." Such is the record presented to this Court.

III.

The Judgment of the Court of Appeals.

The Court of Appeals *ignored* the "constant flow" theory of the Commission. That Court proceeded on the asserted applicability of the cases of *Missouri v. Kansas Gas Co.* (1924), 265 U.S. 298, 44 S.Ct. 544 and *Public Utilities Comm. v. Attleboro Steam and Electric Co.* (1927), 273 U.S. 83, 47 S.Ct. 294, to the facts of this case; and on the meaning attributed by the Court to the statutory exclusion from the coverage of the Natural Gas Act of "the production or gathering of natural gas." However, the meaning attributed to such "exclusion" by the Court of Appeals is not consistent with the views of Mr. Justice Douglas, and his three concurring associates, in the *Canadian River Gas Company* case (324 U.S. 581, 602-3), which views apparently were relied upon to some extent by the Court of Appeals *(R. V. 2, pp. 915-916)*.

IV.

Present Legal Confusion.

The foregoing theories of Commission jurisdiction herein by no means are identical. They rest upon different factual and legal foundations and in their application produce divergent consequences. Which, if any, of such jurisdictional theories is the true legal meaning, scope and effect of Section 1 of the Gas Act, therefore is and must continue to be unsettled and in confusion unless and until this Court adjudicates the controversy by its authoritative judicial determination.

V.

Contentions of Commission Counsel.

This Court having made no declaration of its views in this case, or in any other case, upon the fundamental issue herein presented, we are relegated to the contentions and citations advanced by Commission counsel in support of the rate reduction order under consideration. This entire issue of jurisdiction is disposed of by counsel in an off-hand, generalized and casual manner *(Comm. Br., pp. 8-17)*.

In the first place, the conclusion of a Circuit Court of Appeals is not a final or authoritative precedent as to the

principles of law or the scope of statutory jurisdiction which may have been at issue in such case. Especially is this true where this Court has denied certiorari and by such denial has refused to express any opinion whatever on the merits or propriety of the judgment involved. There can be neither express nor implied approval resulting from such denial in the face of the solemn declaration that such denial "imports no expression of opinion" by this Court *(House v. Mayo, supra)*.

Thus, logically and in common fairness, the following decisions now asserted by the Commission to control others than parties litigant therein must be disregarded here as not binding upon this Court or upon these *amici curiae*. This is true, irrespective of what the decision of the particular Court of Appeals may have been. The decisions so relied upon herein are: *Peoples Natural Gas Co. v. Federal Power Comm.*, 127 F.(2d) 153; *Cities Service Gas Co. v. Federal Power Comm.*, 155 F.(2d) 694; *Hartford Electric Light Co. v. Federal Power Comm.*, 131 F.(2d) 953; *Wisconsin Public Service Corp. v. Federal Power Comm.*, 147 F.(2d) 743 *(Comm. Br., pp. 8, 9, 11, 12, 16, 17, 20)*.

Similarly, decisions of this Court adjudicating whether a State in regulation or taxation has encroached upon the broad constitutional concept of "commerce * * * among the several states," an authority reserved to the Federal government, are not precedents in reliance upon which any authority whatever over any part or parcel of the natural gas industry lawfully can be appropriated by or delegated to the Federal Power Commission. Such Commission cited decisions are: *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 42 S.Ct. 106; *State Tax Comm. v. Interstate Natural Gas Co.*, 284 U.S. 41, 52 S.Ct. 62; *Hughes Brothers Co. v. Minnesota*, 272 U.S. 469, 47 S.Ct. 170; *Lemke v. Farmers Grain Co.*, 258 U.S. 50, 42 S.Ct. 244; *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 45 S.Ct. 481; *United Fuel Gas Co. v. Hallanan*, 257 U.S. 277, 42 S.Ct. 105 *(Comm. Br., pp. 9, 16, 17)*.

Again, all determinations by this Court as to the scope or coverage of federal statutes regulating "commerce * * * among the several states" are controlled and limited by the terms of the statutory grant of or limitation upon the particular authority delegated by the Congress. This principle,

of course, is foundational in our federal structure of government, although disregarded by Commission and Court of Appeals alike. The history of such legislation, uniformly and consistently through the years, discloses a careful, precise and discriminating use of language in the delineation of the federal authority which Congress in each particular enactment proposed should be exerted. As a matter of fact this Court heretofore in dozens of cases has rested its decisions on this thoroughly established and judicially understood Congressional technique *(Kirschbaum v. Walling,* 316 U.S. 517, 520-523, 62 S.Ct. 1116, 1118-1120). In this case the Commission relies on several such cases in which the broad jurisdictional grant of authority by the Congress is neither identical with nor similar to the admittedly limited jurisdictional delegation found in Section 1 of the Gas Act. The cited decisions are: *Lemke v. Farmers Grain Co., supra; Stafford v. Wallace,* 258 U.S. 495, 42 S.Ct. 397; *Swift & Co. v. United States,* 196 U.S. 375, 25 S.Ct. 276; *United States v. Reading Co.,* 226 U.S. 324, 33 S.Ct. 90 *(Comm. Br., p. 17). (See also Brief, Amici Curiae, pp. 12-15, 15-24.)*

Additionally, Commission counsel refer generally by citation to the cases of *Colorado Interstate Gas Company* (324 U.S. 581), of *Panhandle Eastern Pipe Line Company* (324 U.S. 635) and of *Hope Natural Gas Company* (320 U.S. 591). In none of the foregoing cases was there an *actual authoritative* determination of the highly controverted issues of Commission jurisdiction over "the production or gathering of natural gas" and other local operations and activities.

In each of such cases the company involved was: (1) The local field producer or purchaser; (2) the actual transporter in interstate transmission; and (3) the actual vendor of the natural gas in the State of destination, after interstate transportation in its own pipeline system. Here Interstate Company actually and admittedly is engaged *only* in one of the three enumerated activities, to-wit: the local field production, purchase and local field sale of natural gas *(R. V. 1, pp. 82-83; Comm. Br., p. 2).*

What the meaning, force and effect of the *three variant, divergent, minority* opinions of this Court in the *Canadian River Gas Company* case (324 U.S. 581) might be held to be as a precedent, this Court has been unwilling to clarify and

settle, although repeatedly requested so to do. *(See Brief Amici Curiae, pp. 53-55.)*

But whatever construction be given to the *Canadian River Gas Company* case, *supra*, and similar cases, on the foundation of the actual interstate operations there present, this case is something else and constitutes a much greater reach for jurisdiction. Here Interstate Natural engages in no operations or activities of any kind whatever which are or in reason can be claimed to be "in interstate commerce," except by some sort of legal fiction not embodied in the Gas Act.

The cases of *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498, 62 S.Ct. 384 and *Colorado-Wyoming Gas Co. v. Federal Power Comm.*, 324 U.S. 626, 65 S.Ct. 850, also cited by Commission counsel *(Comm. Br., p. 16)*, are predicated upon specific Commission findings that each of such pipeline companies, operating in the States of destination and consumption of the gas, was part of "a single enterprise" engaged in the interstate transportation of gas from the State of origin and sale thereof for resale at the termination of the interstate transmission. The record here does not permit a finding of "a single enterprise" as between Interstate Natural and any of the three local Monroe field purchaser pipeline companies, and no such finding was indulged by the Commission *(R. V. 1, pp. 82-83)*.

The *Kansas Gas Company* and *Attleboro Company* cases, *supra*, are considered *infra*. Each of such cases involved *the operations of a single company*, extending from the State of production or generation to the ultimate sale for resale in the State of destination after interstate transportation by such company.

Whatever jurisdiction the Commission possesses over any portion of the property or operations of those engaged in the natural gas business, must find its specific warrant in Section 1 of the Gas Act. That section Commission counsel do not discuss. On the contrary, the *assumption* is *(Comm. Br., pp. 16-17)* that whatever authority Congress could have conferred somehow was vested in the Commission, a concept at war with our constitutional structure of government and with the decisions of this Court for much

more than a century. Thus is made manifest the fundamental and essential weakness of the Commission case.

VI.

Applicable and Controlling Law.

The Natural Gas Act provides, *as to the regulatory jurisdiction of the Commission:*

> *"The provisions of this Act shall apply to* • • • *transportation* • • • *in interstate commerce"* and *"sale in interstate commerce* • • •."

There is no other grant or delegation of regulatory authority contained in the Act.

The Act is silent as to "transportation" or "sale" which "affects," or is in the "flow" or "current" of commerce. None of the standard statutory terms by which the federal authority exerted by Congress is extended beyond that which is "*in* interstate commerce" can be found in Section 1, or in any other portion of the Act. The Congress deliberately *excluded* all concepts of enlargement from the coverage of the Gas Act, in the face of Commission proposals *(Br. Amici Curiae, pp. 18-23)* for complete overall coverage, and after specific consideration of the *Kansas Gas, Attleboro* and other cases now relied upon by the Commission *(Comm. Br., pp. 16-17)*. Such Congressional procedure is highly significant *(Federal Trade Comm. v. Bunte Bros.*, 312 U.S. 349, 352, 61 S.Ct. 580, 582).

The Commission in its brief identified the *Kansas Gas* and *Attleboro* cases with its "constant flow" theory herein applied *(Comm. Br., pp. 16-17)*. Such postulate is not consistent with the Act as enacted, for Congress specifically rejected the concept of jurisdiction predicated on "constant flow from the mouths of the wells • • •" *(Br. Amici Curiae, pp. 15-24)*. The two cases in question rest on the doctrine of a "single enterprise," extending from the State of origin to the ultimate sale, after interstate transmission, in the State of destination. The "single enterprise" foundation of jurisdiction, however, is not supported by the evidence or by any Commission finding in this case *(R. V. 1, pp. 63-67, 79-80, 82-83, 84-85)*. This case is not *in fact or in law* the *Kansas Gas* or the *Attleboro* case. *(See Brief, Amici Curiae, pp. 12-19.)*

There is no statutory grant or delegation of any regulatory authority whatever over "production or gathering" or over any of the property, facilities, activities, operations, revenues, expenses, profits, returns or incidents thereof.

The Commission rate reduction order herein, nevertheless, directly, avowedly and expressly *regulated* the property, the facilities, the activities, the operations, the revenues, the expenses, the profits, the return and other incidents of production and gathering *(R. V. 1, pp. 63-73, 75-80, 84-85)*. See *Southern Pacific Co. v. Interstate Commerce Comm.*, 219 U.S. 433, 31 S.Ct. 288.

The Commission being a creature of statute, it has no power or authority whatever, save that which the Congress by statute has delegated to it *(Panhandle Eastern Pipe Line Co. v. Federal Power Comm.*, 324 U.S. 635, 65 S.Ct. 821; *United States v. Chicago, M.St.P. & P. R. Co.*, 294 U.S. 499, 55 S.Ct. 462). For the purposes of this case the Natural Gas Act is the sole cachet of its authority.

What then is the legal foundation and warrant for the assumed regulatory authority exercised in this case by the Commission? It did not arise from any statutory "grant or delegation" of authority, for there is none such in the Act.

The Congress additionally enacted "specific denials of power to the Commission," which denials, in good faith, cannot be "construed" into either additional grants or delegations of authority, or as enlargements of any specific grant or delegation expressly made *(Connecticut L. & P. Co. v. Federal Power Comm.*, 324 U.S. 515, 65 S.Ct. 749).

The statutory "specific denials of power" are:

> "The provisions of this Act * * * *shall not apply to any other transportation or sale* of natural gas * * *"
>
> "The provisions of this Act * * * *shall not apply* * * * *to the production or gathering* of natural gas."

The language of *denial* of authority over "any other transportation or sale," certainly discloses neither expression nor intent to grant, but only to withhold authority.

Similarly, the absence of any statutory declaration of coverage of "production or gathering," separately considered or combined with the direct words of statutory denial of authority in connection therewith, discloses neither an intention nor an expression of a grant of authority over "production or gathering." From the face of the statute, exactly the opposite is manifest.

Yet, despite the entire absence of any *affirmative grant* or delegation of authority, and notwithstanding the *express denial* of authority, both Commission and Court of Appeals proceeded on the theory that, since Congress *could have exerted* a federal regulatory authority *from* the "mouths of the wells" or *from* the "point" of local field sale and delivery in the State and field of origin, the Commission properly may assume and exercise such authority. The actual assumption is that the Commission lawfully may do this, without any statutory grant or delegation of such authority, ascertainable from the Act, from the development of the structure thereof, from the legislative history of the Act, or from the established Congressional understanding and use of language in statutes relating to interstate commerce *(Br. Amici Curiae, pp. 12-15, 15-24)*. Such is not the law *(Kirschbaum v. Walling, supra, Federal Trade Comm. v. Bunte Bros., supra)*.

This Court in the foregoing cases made it emphatically clear that Congress invariably defines and differentiates with particularity the measure and scope of the actual Federal control over "commerce * * * among the several states" which it contemplates shall be exerted under each specific enactment. The Congressional refusal to grant the broad powers, as was here sought by an administrative agency, is compelling if not conclusive evidence that the broad authority proposed was in fact withheld. This Court has declared itself bound by such Congressional procedure.

Commission and Court of Appeals alike "found" an affirmative grant or delegation of authority in the statutory "specific denials of power." Such also was the conclusion of Mr. Justice Douglas, and his three concurring associates, in the *Canadian River Gas Company* case, *supra*. The statutory language of **exclusion** thus is converted into language

of inclusion *(See Connecticut L. & P. Co. v. Federal Power Comm., supra)*, and in this manner the regulatory authority which Congress refused to delegate to the Commission is appropriated by that administrative agency with judicial approval.

CONCLUSION.

Whether such presently is the considered viewpoint of *an actual majority* of this Court, certainly should be made clear and certain and not be permitted longer to rest in the realm of silence, speculation, assumption and uncertainty.

Respectfully submitted,

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